SERVED : August 6, 1992

NTSB Order No. EA-3633

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of July , 1992

THOMAS C. RICHARDS,
Administrator,
Federal Aviation Administration,

Complainant,

v.

ALASKA ISLAND AIR, INC.,

Respondent.

Docket SE-10684

OPINION AND ORDER

The Administrator has appealed from the oral initial decision of Administrative Law Judge Jimmy Coffman, issued on December 15, 1989, following an evidentiary hearing.[1] By emergency order, the Administrator sought to revoke respondent's air carrier operating certificate ("ACOC") for violations of numerous sections of the Federal Aviation Regulations ("FAR") , 14 C.F.R. Parts 43, 61, and 135. We grant the appeal.

[1]The initial decision, an excerpt from the hearing transcript, is attached.

Before discussing the facts of the case or the merits of the appeal, there are a number of procedural issues to be resolved. First, respondent ("AIA") has moved to dismiss the appeal on the ground that, after prolonged negotiations and respondent's agreement with proposed terms, the Administrator should be required, instead, to settle. Attached to this motion are correspondence between the parties regarding the negotiations and two versions of a stipulation agreement, one of which has been signed by respondent's counsel. The Administrator has replied in opposition, noting that evidence concerning settlement negotiations should not be admissible.[2]

We agree that the content of settlement discussions has no place in our adjudication of this case. And, the Administrator's decision to proceed rather than settle is not a matter we will analyze or second-guess. If settlement is to be promoted as it should, neither the content or conduct of settlement discussions should be subject to our after-the-fact scrutiny. Accordingly, we deny the motion and its accompanying request that the FAA be directed to agree to respondent's proposed stipulation.[3]

Second, on August 6, 1990, respondent filed a motion to extend the time to file his brief (accompanied by the brief

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[2]The Administrator cites Administrator v. Honan, 4 NTSB 418, 420-(1982).

[3]By the same token, we decline to strike all references to settlement negotiations, as the Administrator seeks. Just as in Honan, supra, we find that the references do not prejudice the Administrator's case, and note that he does not so argue.

itself) from July 9 to August 6.[4] The motion will be denied and respondent's reply to the appeal will be stricken. Although the Administrator has taken no position on this matter, respondent has not offered good reason to reverse the original decision of the General Counsel denying the same extension. That letter-decision cautioned, in granting the extension to July 9th, that no further extensions would be granted. Instead of abiding by that direction, respondent's counsel chose to ignore it, accepting other work that called him away from the office at the relevant time and ostensibly precluded him from timely preparing respondent's reply. Counsel's choices in the managing of his legal practice do not constitute good cause to forgive his disregard of the General Counsel's warning.

Finally, citing omissions in the initial decision, the Administrator asks that we reaffirm the 49 C.F.R. 821.42(b) obligations of a law judge.[5] Suffice it to say we agree with the Administrator's concerns, especially critical in emergency proceedings, that law judges provide a full discussion of the factual and legal conclusions on which their decisions are based. [6]

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[4]This brief was originally due in April of 1990.

[5]This rule provides: "The initial decision shall include a statement of findings and conclusions, and the grounds therefor, upon all material issues of fact, credibility of witnesses, law, or discretion presented on the record, "the appropriate order, and the reasons therefor."

[6]See our recent decision in Administrator v. Schlagenhauf, NTSB Order EA-3611 (1992) at fn. 1.

Turning to the merits, respondent is a Part 135 operator, performing seaplane charter and scheduled passenger and freight service, and is headquartered in Alaska. The record indicates that it was run first by Lloyd Roundtree, who purchased it in the 1970%, and since 1981, by his son 'Dane, who is its Director of Operations, Director of Training, General Manager, and vice President. In the emergency order of revocation dated November 13, 1989,[7] the Administrator charged that respondent, through Messrs. Roundtree: 1) made or caused various fraudulent or intentionally false entries on pilot records; 2) failed to maintain required pilot qualification records; 3) used pilots in revenue service when they did not have all training or qualifications required by the FAR and respondent's own manual; 4) failed to provide required rest periods for Dane Roundtree and showed him off-duty when he was not; and 5) allowed preventive maintenance to be performed by an unqualified individual. The Administrator charged respondent with violations of FAR sections 43.3(a), 61.59(a)(2), 135.63(a)(4), 135.95(b), 135.267(f), 135.293(a) and (b), and 135.343.[8]

The law judge found that the Administrator had not met his burden of proving respondent "lacked the care, judgment and

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[7] In his notice of appeal of the law judge's decision, the Administrator withdrew the emergency and noted his return of respondent's air carrier operating certificate. Our General Counsel approved the withdrawal on December 18, 1989. Accordingly, the 60-day schedule was mooted.

[8] These provisions are summarized infra. The Administrator did not pursue the § 61.59 charges on appeal.

responsibility necessary to maintain and operate a 135 certificate ." Tr. at 520. He acknowledged that "mistakes were made," but noted that AIA was "trying to keep an operation together, and really has not had enough time to devote to the regulations." Id. He concluded that the preponderance of the evidence did not support the allegations of the revocation order. Tr. at 521-522.

In his appeal, the Administrator argues that the law judge's conclusions of law are inconsistent with certain findings of fact and record evidence. We agree, and address each disputed area below.

1. Section 43.3(a). This section governs the performance of preventive maintenance and, among other things, prohibits Part 135 pilots from performing these tasks. AIA had the benefit of an exemption (#4802) that allowed pilots employed by Alaska Air Carrier Association members to remove and replace seats after an approved training program. The law judge found that an AIA employee, Mr. Herrera, removed aircraft seats in the evening and reinstalled them in the morning,[9] but questioned that this was '*preventive maintenance." The law judge also stated: "I know Mr. [Dane] Roundtree testified he thought that was covered by the exemption, but realizes now that it was not." Tr. at 521. See Tr. at 434-435.

We agree with the Administrator that the law judge's finding

[9]The record is not entirely clear on this point, but it appears that Mr. Herrera's task was limited to replacing the seats at night. Tr. at 426-427. The difference is not material.

is not in accordance with the law or the evidence. The law judge's belief that this function was not preventive maintenance, while perhaps understandable from the wording of the rule, especially its Appendix A item (c) (15) (which suggests that installation of replacement parts is contemplated), is not supported in the record. Indeed, respondent did not challenge the Administrator's interpretation of section 43.3, and it is supported by the wording of Exemption 4802 itself, which was sought by Alaskan air carriers.[10] Thus, we must conclude on this record that the Administrator's interpretation is the correct one, and is so understood in the industry.

Mr. Herrera was not a pilot employed by AIA, as the exemption uses the phrase, nor was he otherwise authorized to perform preventive maintenance on AIA aircraft. From the exemption, it is clear that the reference is to persons employed as pilots, not an employee such as Mr. Herrera who may happen to have a private pilot certificate but is working in another type position. Thus, even were Dane Roundtree to have given Mr. Herrera the proper training (which is unclear), Mr. Herrera's performing this function violated section 43.3(a).

2. Part 135. sections 95(b) . 293 [a) and (b) , and 343. The first cited section requires AIA's use only of qualified airmen. Section 135.293(a) prohibits AIA from using pilots that have not

[10]The exemption states: "The exemption would allow the pilots employed by AACA member air carriers to perform the preventive maintenance function of removing and\or replacing the passenger seats of aircraft used in FAR Part 135 operations."

had an annual oral or written test given by the Administrator or a check airman, covering (among other things) the aircraft to be flown, the company manual, relevant portions of the FAR, Parts 61, 91, and 135, navigation, and meteorology. Section 135.293(b) adds a competency (flight) test requirement. The last cited section, as pertinent to the facts of this case, prohibits AIA from using pilots who have not completed the carrier's initial training program.

The law judge did not discuss or make any particular findings regarding these claimed violations. Nevertheless, certain conclusions are supported in the record.

There is no doubt from the record that respondent used pilots Christie, Wohlhueter, and Barendse to operate cargo-carrying flights, and to pilot empty legs of passenger flights. See, e.g., Tr. at 225, 228, 233, 255.[11] The record would also support a finding, despite Mr. Dane Roundtree's generalized statements to the contrary, that these individuals piloted these flights before they had completed all the ground and flight training prescribed in AIA's manual. Tr. at 209-214, 233-242, 254-255, Exhibits A-2 and A-3.[12] And, when Inspector McCoy

[11]The record indicates considerable attention by respondent's counsel to whether these pilots were being paid by AIA at the time, suggesting that, if they were not technically hired pilots, there could be no violation. As the Administrator suggested (Tr. at 491), the regulations do not support this interpretation, respondent cited no precedent for it, and such a conclusion would be inconsistent with aviation safety.

[12]Not only did the training fail to cover all subjects, it was also deficient in other respects. Respondent contends that (continued. ..)

tested pilots Barendse and Christie as required by § 135.293(a) and (b), AIA had already allowed both to operate its aircraft in certificated service (as part of the flight training program) .[13] Accordingly, a preponderance of the evidence supports findings that these sections were violated.

3 . Section 135.267(f). This rule requires that AIA provide each crew member at least 13 rest periods of at least 24 hours in each calendar quarter. The unrebutted evidence also establishes that respondent did not fulfill this requirement. At best, the record shows that Dane Roundtree had 12 rest periods in the July - September 1989 quarter. See Exhibit A-18 and Tr. at 172-173.

4 . Section 135.63(a] (4). Pursuant to this section, AIA is obligated to retain at its business office (for 1 year, see subsection (b)) and make available to the Administrator records

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[12](. ..continued)
the extended self-study the pilots undertook qualified as instruction, per the manual and, therefore, that the pilots' instruction time exceeded manual requirements. This claim is not borne out by the AIA manual. It states that "The pilot will be given a list of material and subjects for study prior to the ground instruction. Conduct of the ground instruction will consist of instruction in subject areas, review, examination, and discussion of the subjects."

We also are confounded by respondent's claim that its practice of giving an open book test meets AIA's own manual requirement that a test be given after initial ground training. See Exhibit A-4.

Finally, we note that the AIA -manual provides that flight training will be conducted in accordance with Part 61. Section 61.169 requires dual controls. The aircraft AIA used for flight training were not so equipped.

[13]Both failed the test the first time.

for each pilot used in the Part 135 operation, including dates and results of initial and recurrent competency, proficiency and route checks, and "the pilot's aeronautical experience in sufficient detail to determine the pilot's qualifications to pilot aircraft in operations under this Part.** The law judge specifically found (Tr. at 521) that there were "no records" for Mr. Reimer, an AIA pilot until March of 1989.[14] And, as the Administrator points out, respondent did not keep all the records required for pilot Christie. Tr. at 448-449.[15]

Having found that the Administrator established these violations by a preponderance of the evidence, we turn to the appropriate sanction. The Administrator now seeks a 120-day suspension of respondent's ACOC. Although we do not believe the cases cited by the Administrator, which involved unqualified pilots participating in passenger-carrying operations, necessarily require a 120-day suspension here, we find this sanction in line with precedent and the nature and extent of the offenses.

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[14]The law judge later correctly found that there were pilot flight time records for Mr. Reimer for 1986-1987. There is no claim that these records satisfy the section's requirements.

[15]The Administrator also alleges that Dane Roundtree's records violated this section in a number of respects. We will not reach these matters. We are unwilling to conclude that the responsibility for Mr. Roundtree's lack of records lies with AIA when there is the distinct possibility that records to comply with this section were destroyed, based on Dane Roundtree's understanding of a conversation he had with Inspector McCoy (to the effect that his file of records was too full, could lead to technical violations the more papers were inspected, and should be purged of all non-current materials). See Tr. at 154-157 and 419-420.

Although it was error for the law judge to decline to find violations when they were clearly established by the evidence, we agree with some of the sentiments that led to his ultimate conclusions. The Administrator is now prosecuting respondent for a number of activities that, based on the unrebutted testimony of a former FAA employee and former Principal Operations Inspector for AIA, were either condoned or encouraged in the past.[16] Although this is not a basis for dismissing the charges, it is appropriate, we think, to take it into account both in the context of notice to airmen and consistency of FAA enforcement policy. See, e.g., Administrator v. Doty, 5 NTSB 1529 (1986).

On the other hand, we are deeply concerned by Mr. Dane Roundtree's failure, after the FAA inspector had spoken with him a number of times, to comply with, or obtain an exemption from, the requirement that training be conducted in an aircraft with dual controls, and the implications of his behavior on his compliance disposition. We are also concerned with his apparent willingness to "reconstruct" records from memory (Tr. at 420) , to change dates on training records (Tr. at 473) , to "train" himself (Id.), and to short-cut ground training for new AIA pilots.

In Administrator v. Rasmussen, 5 NTSB 1680 (1987), we affirmed a suspension of 45 days for violating § 135.293(a) and

[16]Check rides without dual controls were allowed (Tr. at 380-384), as were self-study and flight training during cargo flights (Tr. at 386-387). This witness testified, moreover, that it was FAA counsel that declined to take action to enforce the dual control requirement. Tr. at 389.

(b).[17] In view of the other violations here, We find a 120-day suspension appropriate as a punitive and deterrent measure.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;

2. The initial decision is reversed; and

3. The 120-day suspension of respondent's air carrier operating certificate shall begin 30 days from the date of service of this order.[18]

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[17]And, in Administrator v. Air San Juan, NTSB Order EA-3567 (1992), a similar case in some respects, we affirmed revocation of an ACOC for extensive violations of Parts 61, 91, and 135, many of the latter violations involving training omissions and use of unqualified pilots.

[18]For the purposes of this order, respondent must physically surrender its certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).